IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3676 OF 2007

Pavitra Shripad Takle & Anr. ...Petitioners

V/s.

Aloke Enterprises & Ors. ...Respondents

.....

Ms.Sonal for Petitioners.

Ms.Smita Gaidhani for Respondent No.1.

Mr.Ravindra Sharma for Respondents 2 to 4.

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CORAM: A.M.KHANWILKAR, J.

AUGUST 10, 2007.

P.C.

1. Heard Counsel for the parties.

2. Rule. As short question is involved, Rule made returnable forthwith by consent. Ms.Gaidhani waives notice for Respondent No.1. Mr.Sharma waives notice for Respondents 2 to 4.

3. This Petition takes exception to the Judgment and Order dated 22nd January 2007 passed

by the Civil Judge, Senior Division, Nashik in Application under Exhibit 54 in Special Civil Suit No.104 of 2005, which reads thus:

> "It is nowhere alleged in this application as to whether defendant has raised the ground of jurisdiction in written statement. The issues are framed on the basis of pleadings. No such issue of jurisdiction has been framed by this court. Hence no question of taking it to be preliminary. Hence rejected."

4. The sole basis on which the Application filed by the Petitioners before the lower Court has been rejected is that in the application, it is nowhere mentioned on behalf of the Petitioners that they had raised the ground of jurisdiction in the written statement. This assumption noted in the impugned order is manifestly wrong, as it clearly overlooks averment in Para 3 of the Application, which reads thus:

> "3) The defendants had agitated in their written statement that in said alleged agreement contains arbitration clause in case of dispute between parties, therefore the present suit is not maintainable."

5. The Petitioners specifically asserted in the subject application that in the written statement, issue regarding maintainability of Suit has been specifically raised with reference to the Arbitration Agreement. I am not examining any other contention available to the Respondents to oppose the Application for the first time in this Court. Instead, I think it appropriate to relegate the parties before the lower Court, who in turn, shall consider the application afresh. Accordingly, I proceed to pass the following order:

a) Impugned Judgment and Order dated 22nd January 2007 below Exhibit 54 in Suit No.104 of 2005 is set-aside. Instead, Application Exhibit 54 is restored to the file to its original number to be heard and decided on its own merits in accordance with law. All questions available to the parties in the context of the reliefs claimed in the said application are left open to be considered by the lower Court on its own merits uninfluenced by the impugned decision, or

for that matter, the present order.

b) Parties to appear before the Trial Court on 29th August 2007, on which date the lower Court will proceed to hear the application forthwith or on such other date as may be convenient, while ensuring that the Application Exhibit 54 is finally disposed of not later than 1st October 2007.

A.M.KHANWILKAR, J.